IN THE

# Supreme Court of the United States

October Term, 1924.

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No. 360.

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THE UNITED STATES, *Appellant,*

*vs.*

DANIEL NOCE.

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## APPELLEE'S BRIEF.

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Washington,
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## APPELLEE'S BRIEF

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### *Statement of Case*

The question is whether by virtue of the following proviso to Section 11 of the Act of May 18, 1920 (41 Stats. 401),

> "That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, Coast and Geodetic Survey, shall be based on the total of all service in any or all of said services,"

appellee, after the date of approval of said act, is entitled to count his West Point cadet service for longevity pay, notwithstanding the so-called Hay Provision in the Army Appropriation Act of August 24, 1912 (37 Stats. 594), as follows:

> "That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy, or to the Naval Academy, shall not be counted for computing for any purpose the length of service of any officer of the Army."

The Court of Claims (58 Ct. Cls. 688) held that the above quoted provision of the Act of May 18, 1920, repeals so much of the provision quoted from the Army Appropriation Act of 1912 as prohibits computing the service of a cadet for the purpose of longevity pay, and gave judgment awarding appellee the sum of $476.66 as longevity pay from the date of approval of the Act of May 18, 1920, to April 19, 1922, the date from which the acounting officers began to pay appellee longevity pay without reference to his cadet service.

The Act of July 5, 1838 (5 Stats. 256) and subsequent legislation, especially that in the Army Appropriation Acts of 1881 and 1882 (21 Stats. 346; 22 Stats. 118) authorized longevity pay *for service in the Army*, and this court held in the Morton case, 112 U. S. 1 (1884) and in the Watson case, 138 U. S. 80 (1889), that West Point cadet service was service in the Army and should be counted for such longevity pay. For all these years such was the law until 1912, when the Honorable James Hay, Chairman of the House Committee on Military Affairs, placed in the Army Appropriation Bill a proviso to the effect that West Point cadet service should not be counted in computing for any purpose the length

of service of any officer of the Army, active or retired, which as finally enacted into law was made to apply, not to officers and cadets already in the service, but only to those to enter the Academy thereafter; that is, after August 24, 1912.

Appellee was appointed by the President a cadet at the Military Academy on August 1, 1913. On the same day he signed the following engagement for military service:

> "I, Daniel Noce, of the State of Colorado, aged eighteen years and nine months, do hereby engage, with the consent of my mother, that from the date of my appointment as a cadet of the United States Military Academy, I will serve in the Army of the United States for eight years, unless sooner discharged by competent authority,"

which engagement for military service is required by Section 1321, Revised Statutes, as follows:

> "Each cadet shall sign articles, with the consent of his parents or guardian, if he be a minor and if any he have, by which he shall engage to serve eight years unless sooner discharged,"

and on the same day he took the oath required of a cadet by Section 1320, Revised Statutes, as follows:

> "Each cadet shall, previous to his admission to the Academy, take and subscribe an oath or affirmation in the following form:
>
> "I, A B, do solemnly swear that I will support the Constitution of the United States and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty or fealty I may owe to any State, county or country whatsoever; and that I

will at all times obey the legal orders of my superior officers, and the rules and articles governing the armies of the United States."

"And any cadet or candidate for admission who shall refuse to take this oath shall be dismissed from the service."

Appellee remained as a cadet at the United States Military Academy until April 20, 1917, when he was duly graduated, and on the same day was appointed a Second Lieutenant in the Corps of Engineers of the United States Army, and has served continuously as a commissioned officer until the present time. He was promoted to the grade of First Lieutenant, Corps of Engineers, May 15, 1917, and to that of Captain, Corps of Engineers, on the same day. On August 23, 1918, plaintiff was appointed a Major of Engineers in the Emergency Establishment, United States Army, was honorably discharged therefrom on June 30, 1920, and reverted to his grade of Captain of Engineers in the Regular Army, which office he still holds.

Appellee is therefore a member of the class first to enter and graduate from the Academy after the enactment of the Hay Provision and, accordingly, the first class to be affected by the above provision which first became actually operative in 1918.

The Military Committees in 1919 found the pay of the Army so inadequate that it had destroyed its morale. The committees reported to Congress that "The heart of the combatant services is gone, producing the gravest situation in our first-line troops." (H. R. 617, 66th Cong. 2 Sess.; S. R. 318). To remedy the situation Congress enacted the said Act of May 18, 1920, which is an Act devoted exclusively to increasing the pay of the Army and the other Services and contains

the proviso here as to which the Court of Claims held, quoting the syllabus, that:

> "The proviso to Section 11 of the Act of May 18, 1920 (41 Stats. 601) by necessary implication repeals so much of the provision contained in Section 6 of the Act of August 24, 1912, 37 Stats. 569, 594, as prohibits the computing of service of a cadet at the United States Military Academy for the purpose of longevity pay."

*The Contentions.*

Appellant's Contention: That the Statute simply permits *combinations* of service between the Several Services without affecting the various kinds of Service within any of the several services; that is, establishes "equality" between services, ignoring inequalities within them.

Appellee's Contention: That the Statute means what it clearly says: Longevity pay shall be based on the total of *all* service—that is, of whatever kind and in whatever capacity rendered—in *any* or *all*—that is, in one, or more, or all—of said services.

## ARGUMENT

Appellant, it seems to us, ignores the plain language of the Statute and proceeds to establish his contention by assuming first what (he thinks) Congress should have intended and then wrenching the language to fit the assumption. We prefer to adhere to the language which Congress used; thereby there is no chance of mistaking its meaning.

## I.

## THE LANGUAGE OF THE PROVISO TO SECTION 11, ACT OF MAY 18, 1920, IS SO PLAIN THAT THERE CAN BE NO ROOM FOR CONSTRUCTION.

The elementary rule, we think, has never been better stated than by Justice Day in *U. S. v. Standard Brewery,* 251 U. S. 210, 217, when he said:

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the court to enforce the law as written * * *"

We want to quote this language again and have it considered in the light of the rule:

> "That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, Coast and Geodetic Survey, shall be based on the total of all service in any or all of said services."

We submit that English language could not be plainer, simpler, more unmistakable. It is exceptional to find language in a statute, or elsewhere, so absolutely clear—so clear that it has, and can have, but one meaning.

Appellant seems to recognize the exceptional clarity and singleness of meaning of the above proviso. It is significant that instead of proceeding at once to a consideration of the language employed with a view of determining therefrom what Congress intended, he at the outset enters upon a lengthy discussion of moral

and historical considerations, deducing from them what he thinks Congress should have intended; he then assigns to the language a meaning that expresses the intention thus deduced. So it would have to be. Any doubt about the meaning of the language used must be got from some source other than the words themselves; reading them leaves the mind entirely clear and free from all doubt.

## II.

## APPELLANT CAUSES HIS CONSTRUCTION TO REST ENTIRELY UPON A MEANING WHICH HE ASSIGNS TO THE SINGLE WORD "ANY"—A MEANING WHICH IS UNKNOWN AND UNTENABLE.

1. "*Any.*" Appellant says:

> "The word 'any' does not here mean 'any one.' It means 'some' or 'any two or more.' The latter is one of the meanings of 'any' recognized by the lexicographers."

The Court below rejected such suggested construction, and we surmise it will be quickly disposed of by this Court. We do not say "any" means "one"; we do say it does not mean "two or more" to the exclusion of "one"; we find no such meaning in the Standard or any other Dictionary. Indeed, the Standard's definition of "any," as a pronoun, is: "one or some (indefinitely); one or more persons, things, or portions (indefinitely) out of a number; an indefinite demonstrative; as, "Did you see any of the boys?" The phrase is not "any services", in which "any" is

used adjectively, as appellant reads it, but "any *or all of* said services." When "any" is thus used as a pronoun and partitively (followed by *of* and a plural noun), it must include *one*, no matter how many more. The only question that can arise is whether it means *one only* or *one or more.*

But the phrase used is not "any" but "in *any or all* of said services," which means beyond question that one service is the minimum and all six services the maximum. The only question that might be raised is whether the meaning is limited to *one* of the six on the one hand or to six on the other. In such a case as this, "one or all of said services" means "one, or more, or all." That question was raised and disposed of in *Tarbell and Whitman v. Gifford, et al.*, 79 Vermont, 369, where it was held, quoting the syllabus:

> "In V. S. 1183 providing that, if an execution on a judgment obtained against a partnership, association, or company in its first name is returned unsatisfied in whole or in part, a supplemental suit for the amount unpaid may be brought against 'any or all' of the partners or associates, the phrase 'any or all' means 'some,' however few or many; therefore, such supplemental suit may be brought against *one, or more, or all,* of the partners or associates who were such when the liability merged in the judgment was created."

The contention there made was that the phrase meant one or all, and a motion to dismiss was made on the ground that more than one and not all of the associate members were made defendants. The court, in dismissing the motion, said:

> "We think the term 'any,' as there used in the phrase 'any or all' should not be given its limited

> sense [of one], but its enlarged and plural sense, meaning some, however few or many; an indefinite number. Under this construction, such a supplemental suit may be brought against *one, or more, or all* of the partners, associates or shareholders."

Nor does "some" used partitively, any more than "any" so used, mean "two or more." In *Stiles v. Freeholders,* 50 N. J. L. 11, it is said:

> "As a synonym of 'any,' 'some' applies to *one particular part* in distinction from the rest, 'any' to every individual part without distinction; the former is altogether restrictive in its sense, the latter is altogether universal and indefinite."

Or, it means, certainly in logic, "at least one, perhaps all." (Century.)

2. *"Total."* Appellant finds confirmation of his *combination* or *two or more* idea in this word "total," as meaning the "totalling of services in two or more branches." Such a view again ignores the statute What service is totalled? The statute conclusively answers: *All* service in any one, or more, or all of said services; that is, the total of all service, of whatever kind in whatever service rendered. An officer of the Army may add all his service as recognized by statute in the Army; enlisted man in Regulars, enlisted man in Volunteers, officer of Volunteers, cadet at the Military Academy, contract surgeon, and so on, and to these, if he has served in the Coast Guard, for instance, he may also add the elements of his service there.

3. *"All service." Appellant has to concede also that under his construction "all service" cannot mean "all service" but means "any service in any branch which*

*might be counted for longevity and which might thereafter be added to any service in any other branch which might be counted for longevity.*" (Brief p. 10.)

Considerable qualification of "all," a rather absolute word. It alone should be sufficient to cause the rejection of appellant's construction.

## III.

## THE LEGISLATIVE HISTORY OF THE HAY PROVISION OF 1912 AND THAT OF THE PROVISION OF 1920, PROPERLY UNDERSTOOD, SHOW THAT IT WAS THE PURPOSE AND EFFECT OF THE LATER PROVISION TO AUTHORIZE THE COUNTING OF CADET SERVICE FOR LONGEVITY PAY AND TO REPEAL TO THAT EXTENT THE EARLIER HAY PROVISION.

As to the "discrimination" in favor of West Point officers, and against others, as to which appellant's Brief assumes so much, little need be said. In fact, it has never existed. With the exception of the Hay report, no mention can be found of such discrimination in the annals of our Government; this, for the simple reason that none ever existed: every other kind of service in the Army counted. It may be observed that since 1912 there has been an extension to include service outside of the Army.

The Hay provision of 1912 does not initiate a policy. It was contrary to what had long existed; it was disapproved by the Department, by all the minority members of the Committee, was struck out by the Senate, and finally passed in its present form after a conference report as part of general legislation on an Appropriation Act which, under the plea of economy, so far

reduced the Army and its pay as to be vetoed by the President "as unwise and dangerous" (House Document 835). The later bill (H. R. 25531), identical with the one that was vetoed, took exactly the same course up to the point of conference, where a few of the larger provisions, such as the reduction of ten regiments of cavalry, were finally eliminated but, by way of compromise, the modified cadet provision was retained.

1. *The Chief Object of the Hay Act of 1912 Was Economy, a Reduction of the Army and Its Emoluments; the Sole Object of the 1920 Act Was to Increase Pay and Emoluments.*

Regarding the necessity of enacting the 1920 Act, the House Committee said (H. R. 617, 66 Cong. 2nd Sess.):

> "The Committee has given the most careful consideration and study to the bill which was referred to it providing for an increase of pay for the personnel of the military forces. The underlying reason for an increase of pay is based upon the extraordinarily high cost of living from which the entire country is suffering. It is unnecessary to enter into details regarding the high cost of living as the facts are only too real to us all, but it is desirable to review the effect that the economic situation has had upon the United States Army. Investigation reveals the fact that the army is in a serious condition. The extraordinarily high cost of the necessities of life has reduced the standard of living to which officers and men have been heretofore accustomed, and there has resulted a state of discontent and low morale in the service * * * officers, non-commissioned officers and privates of

various ranks and grades have all appeared before the Committee and submitted statements showing their actual expenses and income and eloquently testifying to the hardships they were compelled to undergo in order to meet the requirements of their rank and the necessities of the service. Officers find that under present conditions they can not live on their pay and maintain themselves and their families in a modest and decent manner. They are embarrassed to a degree which jeopardizes efficiency. Largely as a result of the distressing situation, more than 2,180 regular army officers have to date resigned their commissions * * * one officer out of every five have resigned. If we consider only infantry and cavalry together, the proportion is one out of every four, and if we consider the field artillery and cavalry, the proportion is one out of three.

*"In other words, the heart of the combatant services is gone, producing the gravest situation in our first line troops."*

Sen. Rep. 318, 66th Congress, 2nd Session, December 8, 1919, also said:

"Your Committee has given the most careful study to the problem which confronts the personnel of our military forces, growing out of the immensely increased cost of everything necessary to enable one to live with any degree of comfort or even decency. * * * Largely as a result of this distressing situation over 2,100 regular army officers have resigned and left the service and many more are trying to get out."

2. *Congress Said Its Language Placed All Services on an Equality in the Matter of the Computation of*

*Longevity (H. R. 948, 66 Cong., 2nd Sess.): Appellant's Construction by Preserving Inequalities Within Each Service and Maintaining the Differences Between the Several Services Makes Such Equality Impossible.*

It is difficult to see how things can be said to be equal when there is no like unit of measure for both. Services, after all, are but persons. How can services be said to be on a plane of equality when no one service has equality within its own personnel? As long as there is inequality within a service, that service cannot be placed on an equal plane with another service in which there is also inequality. Some army officers can count their West Point service, others cannot; the same is true of naval officers in respect to Annapolis service. Some Annapolis graduates (on being transferred to the Army, as many are) can count their Annapolis service in the Navy, Marine Corps and Coast Guards but not in the Army. Each service has similar inequalities. It is idle to talk about services being upon an equality when they are so unequal within themselves.

The Court of Claims discussed this point thus:

> "In explanation of this section the managers on the part of the House reported 'it also contains a proviso placing all the service on an equality in the matter of computation of longevity or service pay.' There was an inequality of longevity pay of officers whose appointments as cadets were prior to 1912 and those whose appointments were subsequent to 1912. The service of a cadet appointed in 1911 could be counted for the purpose of longevity, but the service of a cadet appointed after the act of 1912 could not be counted for any purpose in computing his length of service. Section 11 provides for pay for officers in the Coast and Geo-

detic Survey by prescribing the same pay and allowances that are prescribed for the officers of the Navy with whom they hold relative rank, and this same distinction in longevity pay required by the act of 1912 in the case of Army officers is also required in the case of naval officers by the act of 1913 above mentioned, which fact would ultimately lead to confusion and inequality in the pay of the officers in the Coast and Geodetic Survey holding relative rank."

Congress was aware that to get the services on an equality, it must count all service in all services. This it did.

## IV.

## SERVICE AS A CADET AT WEST POINT IS SERVICE IN THE REGULAR ARMY, AFTER THE ENACTMENT OF THE HAY PROVISION AS WELL AS BEFORE.

That service as a cadet is service in the Army, has been settled by the decisions of this Court. (U. S. v. Morton, 112 U. S. 1; U. S. v. Watson, 130 U. S. 80; U. S. v. LaTourrette, 151 U. S. 572.)

Under existing as well as all previous Army Organization Acts, the cadets at the United States Military Academy are as much a part of the Regular Army as any regiment of the line. The more recent statutes enumerating cadets as component parts of the regular army are the National Defense Acts, 39 Stats. 166; 41 Stats. 759. By statute cadets serve under engagement for service in the Army, under an oath for faithful performance of military duty, and are subject to the Rules and Articles of War.

*The Hay provision did not undertake to say that*

*service as a cadet is not service in the Army;* on the other hand it accepted as a premise that service as a cadet was service in the Army but provided that it should not count for longevity purposes (that is, for an increase of service pay, promotion and retirement). The Court of Claims, referring to this, said:

> "Nor does it [the Hay provision] declare that the service of a cadet is not service in the army. On the contrary, it speaks of 'service' and length of service. The same word is used in the Act of 1920. As was said in *Watson's case, supra*, in referring to words used in the Act of 1881 and that of 1838, 'they both mean the same kind of service.'"

## V.

## THE PROVISO TO SECTION 11, ACT OF MAY 18, 1920, IS UTTERLY AND IRRECONCILABLY REPUGNANT TO SO MUCH OF THE HAY PROVISION, SECTION 6, ACT OF AUGUST 24, 1912, AS PROVIDES THAT SERVICE AS A CADET SHALL NOT BE COUNTED IN COMPUTING LONGEVITY PAY, AND THEREFORE REPEALS THE SAME PRO TANTO.

Quoting them again together:

Section 6 (Act of 1912):

> "That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy or to the Naval Academy shall not be counted in computing for any purpose the length of service of any officer of the Army."

Proviso (Act of 1920):

> "That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public

> Health Service and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services."

Obviously the earlier section, in short, says this:

> (1) Hereafter military and naval cadet service shall not be counted in length of service for any purpose;

whereas the later section, in short, says this:

> (2) Hereafter the total of all service in the Army and Navy and the other forces shall be counted in length of service for longevity pay purposes.

The repugnance between the two provisions affects *longevity pay* only. The former provides that cadet service *shall not* be counted as longevity *for any purpose;* the latter that it *shall* be counted as longevity for *longevity pay purposes.* Such is the extent of the repugnancy. In passing upon this question the Court of Claims said:

> "The Act of 1912 did not limit the meaning of service, but its effect was to carve out of the entire service of the officer that period of service passed at the Military Academy in counting the length of service for any of the purposes, as, for instance, the purpose of lineal rank, or of retirement, as well as for the purpose of longevity pay.
>
> "It refers to any purpose, while the latter act is limited to one purpose, that of providing a basis for computing longevity pay. The Act of 1912 specifies that the cadet service shall not be counted in computing length of service for any purpose. The Act of 1920 is limited to the question of

longevity pay. It may be said, therefore, to form an exception to the more general statement in the Act of 1912. See Rogers vs. United States, 185 U. S. 83, 89. 'The total of all service' in the Army includes service at the Military Academy under the authorities mentioned, and this 'total of all service' is the basis for longevity pay for officers in the Army according to the Act of 1920. This requires all service to be counted, while the Act of 1912 forbids a part of the service being counted. We cannot find the 'total of all service' by excluding part of the service from the computation; a service as a cadet is part of the service in the Army. Morton Case; Watson Case; see also Hartigan Case, 196 U. S. 169; Baker Case, 125 U. S. 646; Cook Case, 128 U. S. 254."

As to longevity pay, the conflict is the conflict between the earlier *shall not* and the more recent *shall*. Both cannot stand; the former must yield. *Tynen's Case*, 11 Wall. 88, 92; *The Paquette Habana*, 175 U. S. 677, 685; *Cook County Bank v. United States*, 107 U. S. 441, 445.

## VI

## ASIDE FROM JUDICIAL DECISIONS AND LEGISLATIVE DECLARATIONS, AND HAVING REGARD SOLELY TO ESSENTIAL FACTS AND RIGHT AND REASON, CADET SERVICE IS MILITARY SERVICE.

From the organization of the Academy in 1802, the cadets have been as subject to serve wherever ordered as any regiment of the line. The Act of March 16, 1902, 2 Stat. 137, R. S. 1323, provides:

> "Cadets shall be subject at all times to do duty in such places and on such service as the President may direct."

Cadets, it is believed, have served on the battlefield in every one of our wars since the Academy was founded. Cong. Rec., Feb. 16, 1912, p. 2132.

Cadet service at West Point, however tested—whether by its devotedness, its arduousness, its intellectual and physical requirements, its efficiency of results as shown throughout the history of the Army and the Nation, or by any other consideration—is military service in every real and actual sense. This is a truth to which our Government has upon all occasions given official expression and which is established in the general recognition of our people. If it be said that this particular service is but preparatory in character it can truthfully be rejoined that it is no more so than any other military service not in the face of the enemy. All military service consists (1) in preparing to face the enemy and (2) in facing him. The history of our Army shows that cadet service results in unexcelled preparation for facing the enemy and in unexcelled performance in facing him. If, as this court has said, "Longevity pay is founded upon the equivalent of increased judgment and capacity acquired by the experience of continued service" (18 Ct. Cl. 545), then West Point cadet service should be counted in.

## CONCLUSION

The sole organic purpose of the Act of May 18, 1920, was to increase the pay of officers of the Army, which Congress now found to be hopelessly inadequate. Section 6 of the Act of 1912 was injected into an annual appropriation act at a time when the proclaimed purpose was, not to increase pay, but to decrease all military expenditures. The provision of

1920 speaks clearly, unmistakably and, as might naturally be expected in view of the diametrically opposite purposes behind the two pieces of legislation, it speaks in terms of positive conflict with the provision of 1912, in respect of longevity pay. Thus speaking, as we respectfully submit it does speak, Section 11 of the Act of May 18, 1920, must prevail.

The judgment of the Court of Claims is right, and it should be affirmed.

Respectfully submitted,

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Washington,
April, 1925.

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